No. 83-1481

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

BERNARD PUNIKAIA, et al.,
Petitioners,

vs.

CHARLES CLARK, Director of the
Department of Health for the State of Hawaii,
Individually and in his Official Capacity,
Respondent.

PETITIONERS' REPLY BRIEF TO BRIEF OF RESPONDENT

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INTRODUCTION

Respondent's Brief in Opposition (hereinafter "Brief of Respondent") highlights the necessity for this Court to determine the crucial matters here presented. That Brief and the conflicting lower court decisions in this case[1] reflect an absence of consensus which can only be resolved by this Court on each of the following questions:

1. Does *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980) distinguish between direct and indirect government action in triggering due process rights?

Or, as Respondents assert, does the *O'Bannon* reasoning apply because "no constitutional distinction can be made between indirect and direct termination" (Brief of Respondent at 8)?

2. Has this Court decided, as Respondent claims (and as the Ninth Circuit held), that "transfer trauma" can never call the due process clause into operation?

Or is it the case, as the first panel of the Ninth Circuit ruled, "[t]o the extent . . . that transfer trauma is a possible result of the state's decision to relocate the Hale Mohalu patients, relocation may constitute deprivation cognizable under the due process clause" (App. at A-93)?

3. If state law does not explicitly limit the discretion of a state bureaucracy, may that bureaucracy use life-threatening force against those entrusted to its care with or without regard to federal due process?

4. Is closing a government facility with patients still there a "mere transfer" not involving any reduction of benefits?

Or does the fact that "[t]he state has statutorily conferred upon leprosy patients an entitlement to treat-

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[1]The Ninth Circuit's decision is also inconsistent with those of other circuits, which are cited in the Petition for Writ of Certiorari at 11, n.8.

ment . . ." (App. at A-7) and the fact that a facility has been used for Hansen's Disease patients for 30 years a sufficient interest to require due process?

Litigants and courts are hard pressed to know even whether evidence can be adduced on these questions. In essence, Petitioners and Respondent disagree about the extreme principles of law enunciated by the Ninth Circuit below, and the parties vigorously disagree about whether those holdings were mandated by this Court's ruling in *O'Bannon*.

Respondent does not dispute that *O'Bannon* formed the basis of the Ninth Circuit ruling that a government bureaucracy need not accord due process when terminating life supporting services to a nursing home while the residents are still living there. Respondent also does not dispute that its infliction of life-threatening force in this case against Petitioners was without any judicial proceedings.

Instead, Respondent argues that this Court's opinion in *O'Bannon* affirmatively sanctions the direct termination of benefits by a state agency without due process, even though both the majority opinion of Justice Stevens, the concurring opinion of Justice Blackmun, and the dissent of Justice Brennan rejected that proposition.

The issue of whether the due process clause protects elderly residents of a state-run facility when the state acts directly against them will affect tens of thousands of residents of such institutions. Should this Court grant the Petition, it will have the opportunity to consider the very different arguments which apply when the state directly coerces residents than those which apply in an indirect decertification, as well as to clarify *O'Bannon*.

STATEMENT OF THE CASE

Respondents imply that every lower court has ruled that Hawaiian law gives unfettered discretion to a state bureaucracy to move Hansen's Disease patients at will. Brief of Respondent at 10. This statement is misleading as well as

irrelevant. There have been at least three different results in this case before each of the three different panels of the Ninth Circuit. These varied results reflect the confusion in the lower courts concerning the issues raised by this Petition. The first panel, considering the dismissal of the complaint, found that either the fact that the state had statutorily conferred upon leprosy patients an entitlement to treatment or that transfer trauma could result from the state's decision to relocate patients might constitute a deprivation within the due process clause. App. at A-7-A-9. That panel remanded the case.

A second panel considered the denial by the District Court of Petitioners' Motion for Preliminary Relief, reiterated the holding of the first panel and remanded again. App. at A-29. Upon remand, the District Court on its own motion entered summary judgment in favor of the state. The "five-day hearing" (Brief of Respondent at 3) was not on the merits but was a hearing on the motion for preliminary injunction. Only the third and different panel of the Ninth Circuit found that dismissal was proper.

STATEMENT OF THE FACTS

The Brief of Respondent has omitted several admitted matters of importance, each of which makes the decision of the circuit court below one of serious legal and practical significance.

First, Respondent fails to distinguish between transfer trauma (the phenomena of higher mortality and morbidity rates resulting even from the careful movement of elderly men and women), and infliction of life-threatening force against such aged persons.

Secondly, Respondent refuses to differentiate between a true "transfer" (patients are moved first, and subsequently the facility is closed) and the self-help closure which took place in this case when all life support service was removed from the facility while the patients were still in it.

Finally, Respondent does not mention that the "deterioration" of Petitioners' home took place under the management of Respondent while Respondent was under a contractual obligation of maintenance to the federal government (RT 531:12-540:8).

Respondent also purports to set forth how much is done for Hansen's Disease victims by the State of Hawaii, which he believes justifies the view that these patients are undeserving of legal protection. Brief of Respondent at 3-6. These "facts" are in dispute as well as irrelevant to infringements on the constitutional rights of Petitioners. The brief does not mention that the state of Hawaii receives in excess of $1.8 million annually from the federal government to provide care for Hansen's Disease victims (RT 320:2-22).

The tactics used against these leprosy victims represent a growing problem in Hawaii. There have been a number of incidents in that state in which state bureaucracies, without judicial procedures, took the law into their own hands, and brought in their own bulldozers and armed criminal law enforcement personnel in unannounced coercive moves against its own citizens. Such maneuvers include those at Sand Island, Niumaula, Heeiakea and Makua Valley and Makua Beach. In the absence of legal restraint, there is a tendency for such non-judicially sanctioned self-help tactics to become the standard operating procedure for several Hawaii bureaucracies attempting to effectuate their decisions.

ARGUMENT

A. The Practical Impact of the Decision Below Allows Unprecedented Discretion to State Agencies at the Cost of Undermining Long Established Constitutional Safeguards for Persons Living in State-Run Institutions

Respondent does not dispute (as indeed he could not) that the total denial of food, water, light, heat, refrigeration (for patients requiring daily insulin), medicine and a

telephone, while elderly and disabled people were still inside the facility, placed the lives of the Petitioners in extreme danger. Respondent admits that he failed to seek any eviction proceeding, even though such a summary judicial procedure was easily available under Hawaii law. Respondent also does not dispute that the existence of transfer trauma to these already psychologically damaged men and women would have presented a serious factual question if Petitioners had ever been given an opportunity to present evidence. Respondent's position is that even overwhelming proof of serious psychological damage to the Petitioners because of their move would involve no due process considerations.

In short, Respondent's argument, reflected in the decision of the Ninth Circuit, is that *O'Bannon* justifies the use of such life threatening force by a government bureaucracy against citizens entrusted to its care.

Grant of this petition will give this Court an opportunity to resolve conflicting viewpoints in the lower courts on several important constitutional issues. For example, can a government agency use life-threatening force in a non-emergency situation against those entrusted to its care? If a state court eviction or similar proceeding is available, must such proceeding be utilized before resort to self-help?

Certainly it will be possible to fashion workable rules to guide state bureaucracies and potential litigants. The burdens of following due process are minimal, especially because this Court has recognized the flexibility in precisely what due process is accorded. Moreover, due process is often self-effectuating. Its mere existence is frequently sufficient to assure that state bureaucrats observe minimum procedural standards.

B. Pennhurst Heightens the Importance of Insuring That State Agencies Obey Procedural Constitutional Standards

Pennhurst State School & Hospital v. Halderman, ... U.S. ....., 52 U.S.L.W. 4155 (1984) recently foreclosed certain judicial options available to residents of state-run facilities. Under *Pennhurst,* when an institution is managed improperly under state law, the appropriate forum is the state and not federal court. The problem of deteriorating state-run facilities is a growing one in an era of limited tax resources and emphasis on community-based facilities for the elderly. However, nothing in *Pennhurst* mandated a retreat from the minimum procedural standards so often reiterated by the Court. Indeed, if residents of state-run facilities are not permitted substantively to challenge in federal court the mismanagement of such institutions, it is even more critical that men and women forced to live in such homes be provided that minimum protection offered by due process when such a facility is terminated. Long-standing procedural due process safeguards must not be eroded precisely as forum availability becomes more limited. To do otherwise is to literally invite state agencies to bypass minimum standards of a civilized society.

C. The Prison Cases Decided by This Court Are Not the Standard for Governmental Transfer of Residents in Nursing Homes and Similar Facilities

Respondent's citation of the prison cases, including *Meachum v. Fano,* 427 U.S. 215 (1976) and *Connecticut Board of Prisons v. Dumschat,* 452 U.S. 458 (1981), to justify at-will government transfers of elderly people, without any due process, provides an additional reason for a grant of this petition.

The Ninth Circuit relied on *Dumschat* for the proposition that due process restrictions do not apply to governmental action in closing a state institution. App. at A-25. However,

Dumschat specifically applied only to prison inmates whose liberty interests and due process rights have largely been extinguished by a criminal conviction. *See Meacham,* 427 U.S. at 224 (Stevens, J.) As Justice Burger clearly stated in *Dumschat:*

> "In terms of the Due Process Clause, a Connecticut felon's expectation that a lawfully imposed sentence will be commuted or that he will be pardoned is no more substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope. (Citations omitted.)

The Ninth Circuit errs in concluding that Chief Justice Burger's ruling with respect to convicted felons applies to disabled citizens in a government-run home. This dangerous extension of the prison transfer cases also represents a serious misunderstanding of the reasoning of Justice Blackmun in *Olim v. Wakinekona,* ..... U.S. ....., 103 S.Ct. 1741 (1983) and the majority opinion of Justice Rehnquist in *Hewitt v. Helms,* ..... U.S. ....., 103 S.Ct. 864 (1983).

Finally, reliance on these cases fails to take into consideration the weighing of special policy considerations applicable only to the particular security concerns of prison administrators and the particular characteristics of the prison population. Thus, this Court's approval of discretionary decisions by prison officials that result in inmate transfers has flowed from the recognition "that lawfully incarcerated persons retain only a narrow range of protected liberty interests." 103 S.Ct. at 869 (Rehnquist, J.) Further, prior decisions of this Court "have consistently refused to recognize more than the most basic liberty interests in prisoners." *Id.* The Ninth Circuit's failure to recognize that different considerations might apply to the transfer of convicted felons than to the transfer of elderly citizens in other government-run institutions has not heretofore been sanctioned by this Court.

D. The Extent to Which Due Process Applies to Closures of State-Run Facilities Merits Clarification by This Court

Petitioners certainly agree that a state government is free to close down state nursing homes. However, what is required are practical rules which allow a bureaucracy to terminate such a facility consistent with some minimum constitutional protection for its inhabitants. There was no reason for Respondent to ever put Petitioners' lives in danger. Given the uncertainty of the law in this field, only this Court can now offer some measure of protection to the inhabitants of government facilities.

It seems clear that this Court did not intend O'Bannon to be dispositive of whether transfer trauma can exist where elderly persons are moved. All that *O'Bannon* decided was that under the facts of that case the plaintiffs had not established such a claim. The Ninth Circuit decision in this case, however, would foreclose any orderly development of the law on this issue even though the "state admits . . . and the record reveals that the transfer trauma issue was disputed before the district court," App. at A-18. The Ninth Circuit in effect disagrees with the Second Circuit in *Yaretsky v. Blum,* 629 F.2d 817 (2d Cir. 1980),[2] *rev'd on other grounds,* 457 U.S. 991 (1982), and finds such evidence constitutionally irrelevant under *O'Bannon.* App. at A-18-A-19.

In an attempt to obliterate the *O'Bannon* direct-indirect distinction, the Ninth Circuit fails to address the situation, as here, where the state (and not some private third party)

[2]In *Yaretsky,* the Second Circuit held that Medicaid patients' interest in avoiding the effects of transfer trauma is a constitutionally protected liberty interest where such trauma results from the transfer of a patient from a lower to a higher level of care within existing Medicaid nursing homes. 629 F.2d at 821. The fact that transfer trauma is life threatening has been recognized by the lower courts, *Bracco v. Lackner,* 462 F.Supp. 436 (N.D.Cal. 1978); *Klein v. Matthews,* 430 F.Supp. 1005 (D.N.J. 1977), including the first Ninth Circuit panel that heard this case. App. at A-9.

allowed the nursing home to deteriorate. Hence, Respondent, with its references to closing "the dilapidated treatment facility" (Brief of Respondent at 4) ignores the fact that if the indirect-direct distinction is not adhered to, agencies are actually encouraged to allow facilities to deteriorate and then to terminate the facility on the excuse that they have become "unsafe." Even if such state bureaucracies are permitted to do this, at least minimum due process procedures must be followed.[3]

Respondent states that Petitioners "voluntarily chose to remain" after the bureaucracy stated that it would close the facility. Brief of Respondent at 6. To describe people who find it psychologically difficult to live in the population at large (RT 300:25-320:9), who suffer deformities (RT 300:13-19), and who have treated a residence as their home for decades, as blameworthy, is not a reasonable characterization. Moreover, because Respondent had available summary judicial proceedings to remove them if he believed he had such a right, Petitioners, who claimed a legal right to remain, reasonably believed that they were entitled to stay until conflicting claims were adjudicated.

The position of the Ninth Circuit is that so long as Hawaii law is silent on limiting the discretion of a state bureaucracy, the bureaucracy can act as it pleases with respect to its patients and no constitutional rights can be implicated.

Independently of what state law may provide, Petitioners nevertheless have many separate constitutional

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[3]Respondent argues that due process was accorded below by a series of meetings, almost all of which were held after the decision was actually made. Petitioners' position was that because the decision to close the facility was made by Governor Ariyoshi without respect to any "hearings" (RT 515:21-516:17; 525:8), such meetings were irrelevant. Suffice it to say that this was a disputed issue of fact not reached by the Ninth Circuit, which held that "we therefore need not decide whether the patients were afforded sufficient notice nd hearings to satisfy the Fourteenth Amendment" (App. at A-27).

claims. These include their claim to be free of life threatening force imposed by the state in a non-emergency situation. If this Court permits such force to be used by a government bureaucracy, Petitioners contend that they have the right to due process before the imposition of such coercive tactics. In addition, Petitioners were never given the opportunity to demonstrate their vulnerability to increased morbidity and mortality rates by virtue of transfer trauma. Moreover, as the first Ninth Circuit panel recognized (App. at A-7), Petitioners' history of forcible long term confinement at the hands of the state and their entitlement under federal and state law to treatment at some facility requires some reasonable measure of due process. Finally, in a situation in which all utilities and help are terminated and a facility is shut down with people still inside, then Petitioners have been subjected to not just a mere "transfer" but to a reduction or termination of benefits.

CONCLUSION

This Court has held that "[w]hile the contours of this historic liberty interest . . . have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment" (citations omitted). *Ingraham v. Wright,* 430 U.S. 651, 673 (1977). This constitutionally protected liberty interest calls for definitive resolution by this Court. Petitioners urge that their petition be granted.

DATED: San Francisco, California, June 21, 1984.

Respectfully submitted,

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